IN THE HIGH COURT OF JUDICATURE AT BOMBAY
SIDE JURISDICTION
CRIMINAL APPEAL NO.291 OF 2005

Anwar Ali Kurban Ali Shaikh
R/o. Ismail Compound,
Gandhi Nagar, Charkop,
Kandivali (W), Mumbai-67 ..Appellant.
At present in Nashik Road Central Prison.

V/s.

The State of Maharashtra
(Through Kandivali Police Station
C.R.No.188/1998) ...Respondent.
V/s.

Shri R.R. Mahagaonkar, adv. appointed for the Appellant.

Ms.M.H.Mhatre, APP for the Respondent/State.

CORAM: J.H.BHATIA, J.
DATE : 20th June, 2007.

ORAL JUDGMENT:

1. The accused/appellant has preferred this appeal through jail challenging the order of conviction passed by Vth Ad-hoc Additional Sessions Judge, Sewree, Mumbai in Sessions Case No.706 of 1998 whereby he was convicted for the offence punishable under Section 498A and was sentenced to undergo R.I. for 3 years and to pay a fine of Rs.200/-. He was also convicted under Section 306 of the I.P.C. and was sentenced to undergo R.I. for 5 years and to pay a fine of Rs.200/-. He was also convicted for the offence punishable under Section 304(B) of the I.P.C. and sentenced to undergo R.I. for

7 years.

2. The prosecution case, in brief, is that the deceased Nasima Shaikh was married to the accused/appellant about 6 years prior to the death. The accused used to work as a mason and was addicted to liquor. Therefore, he was always short of money to meet the family expenses. Since after the marriage, he used to beat and ill-treat his wife Nasima Shaikh to pressurise her to bring money from her brother. One year before her death, she had brought an amount of Rs.5,000/- from her brother and about six months prior to her death, she had brought an amount of Rs.1,000/-. In the morning of 7-5-1998, accused had beaten his wife and asked her to bring an amount of Rs.500/- from her brother and therefore, she went to her brother and requested him for amount of Rs.500/-. Her brother P.W.2 Rizawal told her that he would arrange for the amount by evening. Therefore, she returned house and told her husband accordingly. Accused got enraged and beat her. Due to this in anger, she poured kerosene and immolated herself. When she was burning, people from the locality assembled and extinguished fire by pouring water. She was immediately taken to Bhagwati Hospital and was admitted in ward no.4. Hospital authorities informed Kandivali Police Station , therefore, P.S.I.

Basalingayya Poojari immediately went to the hospital and after taking certificate from Doctor on duty that Nasima Shaikh was in a position to make a statement, he recorded her statement, Exhibit 15, which was treated as F.I.R. Meanwhile, he also sent a request letter to Special Executive Officer P.W.2 Ravindra Munde to record dying declaration of Nasima Shaikh. P.W.2 Ravindra also reached the spot at about 11.05 a.m. and recorded her dying declaration vide Exhibit 10. Police recorded statement of brother of Nasima Shaikh. Due to the burn injuries she died. After investigation, charge-sheet was filed and the accused was put to the trial for the offences punishable under Sections 498A, 306 and 304B of the I.P.C.

3. The accused pleaded not guilty and according to him, he has been falsely implicated in the case.

4. On behalf of the prosecution in all 4 witnesses were examined. They are P.W.1 Rizawal Khan, who is brother of the deceased Nasima Shaikh, P.W.2 Ravindra Ramji Munde and P.W.4 Basalingayya Pujari, who had recorded her Dying Declarations. P.W.3 Dr.Vithal Vihurkar had conducted Post Mortem examination on the dead body. Relying on the testimony of these four witnesses and some documents, the learned trial Court

convicted and sentenced the accused as stated earlier.

5. At the outset, it may be stated that there is no dispute that Nasima had died due to burn injuries. Evidence of P.W.3 Dr.Vithal revealed that on 08.05.1998, he had conducted Post Mortem examination on the dead body of Nasima and he had found that she had suffered 95% burns. All the internal vital organs were congested. He opined that death had occurred due to shock due to 95% burns.

6. Evidence of P.W.4 Pujari reveals that on 07.05.1998 at about 10.00 a.m. he was on duty as the Station House Officer at Kandivali police station. At that time he received telephonic information from Bhagvati Hospital that one burnt woman namely Nasima was admitted in Ward No.4. He immediately rushed to the hospital and found that Nasima was lying on a bed with burn injuries and was shouting with pains. Doctor on duty certified that she was in a condition to speak and accordingly, the Doctor also endorsed on the papers on which statement was finally recorded by PSI Pujari. In that statement, which is treated as FIR Exhibit 15, she had stated that in anger she had poured kerosene and set herself ablaze. She also deposed that her husband used

to beat and ill-treat her for bringing money from her parents' place. On the day of incident also he had asked her to bring amount of Rs.500/- from her brother and on that ground he had beaten her. The Dying Declaration also reveals that since the time of marriage, her husband used to ask her to bring money from her brother. On that ground he used to ill-treat her. She also stated that last year her brother had given Rs.5000/- and about six months ago also, he had given an amount of Rs.1000/-. On that day i.e. 07.05.1998 at about 8.00 a.m. her husband had asked her to bring Rs.500/- from her brother. Therefore, she went to her brother at about 8.00 a.m. and requested him to give an amount of Rs.500/-. Her brother assured that he would make arrangement by evening. Saying so, he asked her to go back. Accordingly, Nasima came back to her house and informed her husband. Due to this her husband became angry and beat her. After beating her, her husband left the house. She felt very bad and frustrated due to harassments at the hands of her husband and therefore, she had poured kerosene and immolated herself. This was the first Dying Declaration recorded by the Police Officer.

7. The second Dying Declaration was recorded by P.W.2 Ravindra Munde. According to him, he received

telephonic call from PSI Pujari of Kandivali police station to go to Bhagvati Hospital to record statement of burnt woman. Accordingly, he went to the hospital and recorded statement of Nasima vide Exhibit 10. Though, in the examination-in-chief P.W.2 Ravindra stated that he had been to Bhagvati Hospital at 11.30 A.M., in the cross examination he deposed that he started recording her statement at 11.05 a.m. and completed it by 11.30 a.m. In this Dying Declaration also, she repeated the story, which was recorded in her statement recorded by PSI Pujari.

8. P.W.1 Rizawal, who is brother of the deceased, did not fully support the prosecution and was declared hostile. In examination-in-chief, he deposed that Nasima and her husband were living happy life and she had never told him about the ill-treatment at the hands of the accused. He deposed that on the day of incident he had come to know that his sister had poured kerosene and set her ablaze. Therefore, he went to Bhagwati Hospital to meet her. She told him that in the anger she immolated herself. According to P.W.1 Rizawal, Nasima did not tell him anything more. He also deposed that she had never told him that she was subjected to cruelty or harassment. In the cross examination on behalf of the prosecution however, he admitted that he

had given an amount of Rs.5000/- to his sister but he denied that he had also given amount of Rs.1000/- and that on the day of incident Nasima had come to him to demand Rs.500/- at the behest of her husband. In the cross examination on behalf of the accused, he deposed that Nasima was short tempered and earlier also she had attempted to commit suicide once.

9. In view of the evidence of Rizawal, it is vehemently argued on behalf of the defence that the prosecution could not prove that the accused had subjected his wife to the cruelty on account of demand of money from time to time. The learned counsel for the Appellant Shri Mahagaonkar contended that as per the evidence on record P.W.2 Ravindra had not verified from the Doctor on duty as to whether Nasima was physically and mentally fit to make statement or not and therefore, Dying Declaration Exhibit 10 recorded by him cannot be relied upon. It is further contended that because both the statements were very lengthy and with minute details, they could not be believed particularly when she had suffered 95% burns. In support of this contention the learned counsel for the Appellant placed reliance upon **Mohan Sadhu Kawale v. State of Maharashtra 2004 ALL MR (Cri) 2626**. However, I find that the said authority would not come to rescue the

present appellant in view of different facts of two cases. In the case of **Mohan Kawale,** the deceased had suffered 100% burns and, therefore, this Court held that it was dangerous to accept that such a detailed and long account could have been given by the person, who had suffered 100% burns.

10. In the present case, the deceased had suffered 95% burns and as per the evidence, she was crying with pains. As per the evidence of P.W.4 PSI Pujari when he went to hospital, she was crying with pains and Doctor certified that she was in a position to speak. It may be noted that the incident had occurred sometimes between 9 to 10 a.m. and immediately after burning incident, she was taken to the hospital and at 10.00 a.m. PSI Pujari got telephonic information and rushed to the hospital and according to his evidence, he had commenced recording of the statement at 10.34 a.m. While there is a reason to believe that with 95% burns she must be in a severe pain and crying, there is no reason to believe that she was not in a position to make statement particularly when the doctor on duty had certified that she could make a statement. P.S.I. Pujari commenced recording of statement at about 10.34 a.m. , he must have taken about 10-15 minutes to record the statement. Though specific time of completion is

not taken on record, it may be inferred that recording must have been completed before 11.00 a.m. when P.W.1 Ravindra Munde came there. According to him, at that time doctor was not available but only a nurse was present. The patient was speaking in a low voice. He recorded her statement immediately and completed recording by 11.30 a.m. which means that he had commenced recording of dying declaration within 5-10 minutes after recording of the statement by PSI Pujari. If she was conscious and was fit to make a statement when PSI Pujari recorded statement, there is a reason to believe that she must have been fit when P.W.2 Ravindra also had recorded her statement because time gap between the recording of two statements was hardly of 5-10 minutes. Therefore, merely because certificate from the Doctor was not taken by P.W.2 Ravindra before recording her dying declaration, his evidence and particularly dying declaration recorded by him can not be discarded. From the evidence of Rizawal, it appears that he was outside ward no.4 and was not present when dying declarations were recorded. There is nothing on record to show that brother of the deceased had met or had tried to influence these two witnesses to record false dying declarations to implicate her husband. Therefore, there is no reason why P.S.I. Pujari and Special Executive Officer P.W.4 Ravindra should have recorded

false dying declarations.

11. In view of the two dying declarations of the deceased, it is clear that she was married to the accused about 6 years prior to the incident. It appears that her father had died even before her marriage. Her mother had left the country and had gone to Dubai about two years prior to this incident. According to her since after her marriage, her husband used to harass her to bring money from her brother and she specifically stated that about one year before the incident, she had brought Rs.5,000/- and about six months before, she had brought Rs.1,000/- from her brother. Even though her brother Rizawal did not support the prosecution about ill-treatment, harassment as well as demand, he admitted that he had given an amount of Rs.5000/-. This admission provides corroboration to her statement in the dying declaration. Therefore, I find that her dying declarations are reliable. There was no reason for her to make false statement against her husband particularly when they had also 2 children. She must have been aware that on the basis of her statement, her husband could be sentenced and sent to jail and then there would be nobody to look after her children.

12. Once dying declarations of the deceased Nasima

are believed, it must be held that her husband/accused had subjected her to cruelty as also harassment to coerce her to meet unlawful demands of money and, therefore, accused is liable to be convicted for the offence punishable under Section 498A. From the evidence on record, it is clear that marriage of the accused and deceased Nasima had taken place about 6 years prior to her death and she committed suicide by immolating herself. Section 113A of the Indian Evidence Act, 1872 provides that when a woman had committed suicide within a period of 7 years from the date of her marriage and it is proved that her husband or such relatives of the husband had subjected her to cruelty, the Court may presume having regard to the circumstances of the case that such suicide had been abetted by her husband or by such relatives of the husband. In view of this presumption and the circumstances of the case, accused must be held guilty for abetting his wife to commit suicide under Section 306 of the I.P.C.

13. As stated earlier, the accused is also convicted for the offence of dowry death punishable under Section 304B of the I.P.C. Section 304B of the I.P.C. defines dowry death as follows:

304B. **Dowry death.-**

> "(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> Explanation.- For the purpose of this sub-section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

To prove the offence of dowry death, prosecution has to establish that,

(a). the woman had died because of burns or bodily injuries or under abnormal circumstances or had died unnatural death;

(b). death had occurred within 7 years of marriage.

(c). and it is shown that soon before her death, she was subjected to cruelty or harassment by her husband or any relatives of her husband.

(d). for demand of dowry.

In view of the explanation to sub-section (1) of Section 304B dowry shall have the same meaning as in Section 2 of the Dowry Prohibition Act. Section 2 of the Dowry Prohibition Act, 1961 reads as follows:

> "Section 2, Definition of ’dowry’.- In this

> Act, 'dowry' means any property or valuable security given or agreed to be given either directly or indirectly-
>
> (a) by one party to a marriage to the other party to the marriage; or
>
> (b) by the parents of either party to a marriage or by any other person, to either party to the marriage or to any other person.
>
> at or before or any time after the marriage in connection with the marriage of the said parties, but does not include dower or mahr in the case of persons to whom the Muslim Personal Law (Shariat) applies:
>
> Explanation I.- For the removal of doubts, it is hereby declared that any presents made at the time of marriage to either party to the marriage in the form of cash, ornaments, clothes or other articles, shall not be deemed to be dowry within the meaning of this section, unless they are made as consideration for the marriage of the said parties.
>
> Explanation II.- The expression 'valuable security' has the same meaning in Section 30 of the Indian Penal Code (45 of 1860)."

As held in **State of Andhra Pradesh v. Raj Gopal Asawa and another AIR 2004 Supreme Court 1933,** it is not necessary to prove that there was an agreement for dowry prior to the marriage. However, to prove the offence of demand of dowry, it has to be proved that there was direct or indirect demand of money or valuable property, etc. in connection with the marriage of the said parties and/or in consideration of the marriage. In the present case, marriage had taken place about 6 years before. P.W.1 Rizawal does not support the prosecution

at all about demand made by the accused. Even the two dying declarations did not make any reference to the demand of dowry or demand of any money or valuable articles in connection with the marriage either by way of agreement prior to the marriage or by way of demand immediately after the marriage in consideration thereto. Admittedly, the accused was working as a mason.In her statement recorded by PSI Pujari, Nasima had stated that her husband was working as a mason and he was addicted to liquor and, therefore, he was always short of money to meet the family expenses and because of that he used to ask her to bring money from her brother. It is material to note that as per her dying declaration, first payment was made by her brother only one year before her death. It means for the first five years after marriage, no payment was made by her brother. As per the specific statement by Nasima before the police officer, the accused being addicted to consumption of liquor, he was always short of money to meet the expenses. This prompted the accused to ask her to bring money from her brother. Such payment can not be equated to the demand of dowry, which is in consideration of the marriage or in connection with the marriage. In **State of Punjab v. Daljit Singh and others 1999 CRI.L.J.2723,** 4 years after marriage for sending husband’s brother abroad, woman was asked to bring money from her parents.

It was held that such demand could not be termed as dowry under Section 2 of the Dowry Prohibition Act, 1961 and the offence under Section 304B of the I.P.C. was not made out. In **Appasaheb & Anr. v. State of Maharashtra 2007 AIR SCW 456,** the Supreme Court held that demand for money on account of financial stringency or for meeting urgent domestic expenses does not amount to demand of dowry. In that case, the accused used to demand money for the domestic expenses and for purchase of manure. The Supreme Court held that this could not be treated as demand of dowry and accused could not be held guilty of dowry death under Section 304B of the I.P.C. In my opinion, these two authorities are aptly applicable to the facts of the present case. The accused used to ask his wife to bring money from her brother because of the financial stringency, may be because he was addicted to liquor but it was certainly not a demand of dowry. The learned trial Court has not at all considered this aspect of the matter and wrongly came to a conclusion that the offence of dowry death was proved. In my considered opinion, the offence of dowry death punishable under Section 304B is not proved.

14. In view of the facts and circumstances discussed above, the appeal is partly allowed. Conviction and sentence for the offence punishable under

Section 498A and 306 of the I.P.C. are hereby maintained. However, the impugned order in respect of the conviction and sentence under Section 304B of the I.P.C. is hereby set aside.

(J.H.Bhatia,J.)